

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

TELEBRANDS CORP.,

Plaintiff,

v.

DEL LABORATORIES, INC.
COTY US LLC, and COTY INC.,

Civil Action No. 09-CV-01001

Defendants.

**DECLARATION OF AMR O. ALY IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS OR, IN
THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

I, Amr O. Aly, hereby declare as follows:

1. I am a partner in the law firm of Kilpatrick Stockton LLP, attorneys for Defendants Del Laboratories, Inc., Coty US LLC, and Coty Inc. (collectively "Coty") in this action. I submit this declaration based upon my own personal knowledge in support of Defendants' Motion To Dismiss Or, In The Alternative, For Summary Judgment.

I. The Common Egg Is A Time Honored Source Of Design Inspiration

2. From a design standpoint, the common egg is a thing of great simplicity and beauty, as shown by the antique engravings included in Exhibit 1, which are true and correct copies of two plates from Francis Orpen Morris, *A Natural History of the Nests & Eggs of British Birds*, (London: John C. Nimmo, 1875)), available at <http://books.google.com>.

3. The common egg is a three-dimensional oval form with one tapered end, as shown in Figure 1.

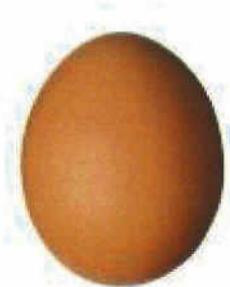


Figure 1

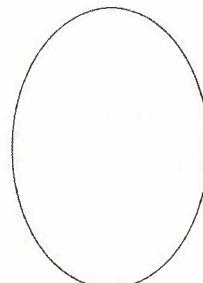


Figure 2

It differs from a symmetrical oval form, in which the two ends are mirror images, as shown in Figure 2.

4. As every supermarket shopper knows, the most commonly available chicken eggs in the United States are buff white. Brown and other color eggs typically sell for a premium.

5. The common egg is widely recognized as a close-to-perfect product and package. It has influenced or served as the inspiration for many designs. For example, in an article entitled *The Shape of the Humble Egg Can Key Pleasing Product Design*, Geoff Ficke explains:

One of the most famous industrial designers of the 20th century was Raymond Loewy. Born in France, Mr. Loewy became the designer of choice for manufacturers of consumable and non-consumable consumer products, industrial transport and corporate logos as a result of the simple design cues that he often built his products around. Visitors to the Loewy shop often noted that there was a bowl of eggs prominently placed in his office. Eggs were a real creative prop for all of Loewy's associates. They were not on hand to be deviled and eaten.

Raymond Loewy felt that the egg was nature's perfect shape. The egg is oval, circular, oblong, smooth, white, and a peculiar combination of strong and brittle. No other shape is so compelling. When viewed it is pleasing, when held it is comforting. He made every effort to utilize the splendid inherent design features of the egg in his industrial design work. The simplicity of the shape became identifiable in 'Loewy product designs.'

A true and correct copy of Ficke, G., *The Shape of the Humble Egg Can Key Pleasing Product Design* (Dec. 29, 2008), which is available at <http://ezinearticles.com/?The-Shape-of-the-Humble-Egg-Can-Key-Pleasing-Product-Design&id=1829981>, is annexed as Exhibit 2.

6. Raymond Loewy's status as the father of industrial design and his penchant for the egg is well documented. Annexed as Exhibit 3 are selected pages from the book Raymond Loewy, *Never Leave Well Enough Alone* (The Johns Hopkins University Press, 2002), originally published in 1950. Annexed as Exhibit 4 is a video clip from the official Raymond Loewy website, <http://www.raymondloewy.com/business/assetsaudio.html>, in which Mr. Loewy explains why the egg is the perfect form. Annexed as Exhibit 5 is a true and correct copy of the article *Still at the Drawing Board, Designer Raymond Loewy Shapes Up Russia's Exports*, People Magazine, pp. 50-3 (Mar. 10, 1975), chronicling Mr. Loewy's life and works. Annexed as Exhibit 6, is a true and correct copy of the article *Modern Living, Up from the Egg*, Time Magazine, pp. 68-74 (Oct. 31, 1949), with a cover featuring Mr. Loewy that includes a prominently-displayed egg.

7. The egg shape has influenced and inspired many other product designers, as exemplified by the following references in industrial design literature:

- (a) the egg-inspired table top objects and jewelry of Ted Muehling depicted in Exhibit 7, which is a true and correct copy of excerpts from *Ted Muehling, A Portrait by Don Freeman* (Dung Ngo, Rizzoli International Publications, Inc., 2008);
- (b) the egg-shaped designs included in the collection of The Museum of Modern Art depicted in Exhibit 8, which is a true and correct copy of excerpts from *Objects of Design from The Museum of Modern Art* (2003), available at the Museum of Modern Art library;

(c) Michael Graves' line of products for Target inspired by the egg, which he reasoned "is an organic form, understandable to all, that is particularly comfortable in the hand," as explained in Exhibit 9, which is a true and correct copy of excerpts from *Design Secrets: Products by Industrial Designers Society of America* (Rockport Publishers, 2003); and

(d) the egg chair designed by Arne Jacobsen in 1958 for Radisson SAS Hotel in Copenhagen, shown in Exhibit 10, which is a true and correct copy of excerpts from the book Kathryn B. Hiesinger & George H. Marcus, *Landmarks of Twentieth-Century Design* (Abbeville Press, 1993).

8. The egg is a staple geometric form used in product and packaging design.

9. Examples of egg-shaped products include pumice stones, sock darners and maracas. Annexed as Exhibit 11 are stock photos of pumice stones (available at http://images.google.com/imgres?imgurl=http://static.bigstockphoto.com/thumbs/8/3/5/large/5382145.jpg&imgrefurl=http://www.bigstockphoto.com/photo/view/5382145&usg=_hasywQW-Hyc05iGWkkHA41zh7wQ=&h=246&w=370&sz=24&hl=en&start=8&tbnid=4VjLDg2rPaEbXM:&tbnh=81&tb, <http://www.crestock.com/image/267303-Pumice-stone-on-other-stones.aspx>, and <http://www.canstockphoto.com/pumice-1252511.html>), confirming that these callous removers are frequently ovoid in shape. Annexed as Exhibits 12, 13 and 14 are photographs of a pumice stone, sock darter and a set of maracas, respectively, recently purchased by Kilpatrick Stockton, as evidenced by the true and correct copies of the receipts included therein.

10. As to product packaging, plastic egg-shaped containers, both filled and unfilled, are a staple seasonal item widely sold for Easter festivities in the United States and at craft stores year round. Annexed as Exhibit 15 is a photograph of plastic egg-shaped containers recently

purchased by Kilpatrick Stockton, as evidenced by the true and correct copy of the receipt included therein.

11. Two well-known product packages that have exploited the egg to great commercial advantage are Silly Putty and L'eggs Hosiery. Annexed as Exhibit 16 is a photograph of a package of Silly Putty recently purchased by Kilpatrick Stockton, as evidenced by the true and correct copy of the receipt included therein. According to the Silly Putty official website, www.sillyputty.com, Silly Putty was introduced in or about 1950. L'eggs Hosiery was introduced in or about 1969, as described in the article Jill Lettich, *L'eggs lays plastic egg to rest – Sara Lee Corp. L'eggs Products Div – Patterns – Apparel*, Discount Store News (Aug. 19, 1991), which is available at

http://findarticles.com/p/articles/mi_m3092/is_n16_v30/ai_11160590/, and annexed as Exhibit

17. Annexed as Exhibit 18 is a photograph of a package of L'eggs Hosiery available at

<http://www.thestrategydaddy.com/strategy-daddy/2009/08/the-pantyhose-revolution.html>.

II. Ovoid Forms Offer “Comfortable Ergonomic Design” For Many Hand-Held Products, Including Foot Care Products

12. Ergonomics has been described as the discipline of obtaining a correct match between the human body, work related tasks and work tools. The definition adopted by the International Ergonomics Association in 2000 (available at

http://www.iea.cc/browse.php?contID=what_is_ergonomics, a true and correct copy of which is annexed as Exhibit 19) is “the scientific discipline concerned with the understanding of interactions among humans and other elements of a system, and the profession that applies theory, principles, data and methods to design in order to optimize human well-being and overall system performance.”

13. Many items we use every day are examples of ergonomic design, although we may not think of them in that light.

14. Elliptical ovoid forms are often used for hand-held products because they fit nicely in the palm of the hand. For example, milled hand soaps are frequently oval, as exemplified by the photographs of DOVE and CASHMERE BOUQUET soaps shown in Exhibit 20, which were recently purchased by Kilpatrick Stockton, as evidenced by the true and correct copies of the receipts included therein.

15. Pumice stones, used to remove foot callouses, frequently have ovoid shapes that fit comfortably in the palm of the hand. *See Exhibits 11 and 12.* So too do sock darners and maracas. *See Exhibits 13 and 14.*

16. Many computer mouses are ovoid forms, as exemplified by the APPLE and DELL computer mouses shown in Exhibit 21 and 22, which are true and correct photographs of an APPLE and DELL mouse, respectively, obtained from the offices of Kilpatrick Stockton.

17. The well-known design firm, Alessi, introduced a hand-held ovoid cheese grater that catches the grated cheese in the lid, as shown in Exhibit 23, which is a photograph of an Alessi grater recently purchased by Kilpatrick Stockton, as evidenced by the true and correct copy of the receipt included therein. The Alessi cheese grater is in the collection of The Museum of Modern Art in New York and offered for sale in its gift shops.

18. Other companies offer ovoid cheese graters that perform the same function, as shown by Exhibits 24 and 25, which are photographs of Bodum and Rosenthal cheese graters, respectively, recently purchased by Kilpatrick Stockton, as evidenced by the true and correct copies of the receipts included therein.

III. The Shape Of Telebrands' PED EGG Foot File Is A Functional Ergonomic Design

19. Telebrands' PED EGG foot file is, according to the Third Amended Complaint, "a foot file designed to remove calluses and dead skin from a user's feet." Telebrands describes the product as follows: "The PED EGG foot file has a unique and distinctive product configuration and trade dress which is characterized, in part, by (a) a generally egg-shaped configuration; (b) a white color; and (c) a curved profile along the lower side edge ('Product Trade Dress')."

20. Submitted herewith as Exhibit 26 is a PED EGG foot file that Kilpatrick Stockton recently purchased, as evidenced by the true and correct copy of the receipt attached therein. A photograph of this same product appears as Exhibit B to the Third Amended Complaint.

21. Although Telebrands refers to its product as an "egg," the PED EGG foot file is, in fact, a symmetrical ovoid form, not the tapered shape of a common chicken egg. *See ¶ 3 above.*

22. The packaging of Telebrands' PED EGG foot file tout its "ergonomic design" and include pictures of it cradled comfortably in a woman's palm and applied to the contoured surface of a woman's foot.

23. The functional ergonomic design of the PED EGG foot file is also described in a utility patent application covering the product produced by Telebrands on March 4, 2009. U.S. Patent Application Serial No. 12/074,603 (Publication No. 2009/0071491), at ¶ 13, states that: the PED EGG has an "ergonomic design to increase comfort and prevent fatigue in the user's hand while the device is being used." *See also ¶¶ 26 and 30.* A true and correct print-out of U.S. Patent Application Serial No. 12/074,603 from the USPTO website www.uspto.gov is annexed as Exhibit 27.

24. Like the ovoid form of the pumice stones, sock darners, maracas, hand soaps, computer mouses and cheese graters discussed in ¶¶ 14, 16-18 above, the ovoid form of the PED EGG foot file is functional in that it is designed to be easily grasped and manipulated by the human hand.

25. Notably, other foot care tools have an ovoid shape and are similarly designed to be easily grasped and manipulated by the human hand. These include the pumice stones depicted in Exhibits 11 and 12, and the products depicted in Exhibit 28, which are photographs of foot care products recently purchased by Kilpatrick Stockton as evidenced by the true and correct copies of the receipts attached therein.

26. The ovoid form of the PED EGG is also functional in that the oval plane of the grater can make the requisite contact with the planes and contours of the human foot to remove calluses and dry skin.

27. Other foot care tools similarly use oval planes to make the requisite contact with the human foot. Representative examples are depicted in Exhibit 29, which are photographs of foot care products recently purchased by Kilpatrick Stockton as evidenced by the true and correct copy of the receipts attached therein, as well as those depicted in Exhibits 11, 12 and 28.

IV. The Telebrands PED EGG Foot File And Sally Hansen PEDI-PERFECT Foot Care Set Differ In Design

28. Submitted herewith as Exhibit 30 is a PEDI-PERFECT foot care set supplied to us by Coty. A photograph of this same product appears as Exhibit D to the Third Amended Complaint.

29. Focusing just on the foot file components of the two products, the PEDI-PERFECT and PED EGG foot files are both elliptical ovoid forms of different overall dimensions. As discussed in ¶¶ 22-27 above, this form is ergonomically designed to fit in the

human hand and scrape the human foot. The ovoid shape is a functional element of both product designs.

30. The PED EGG and PEDI-PERFECT products are otherwise quite different in design. A table summarizing the most obvious differences between the two products is set forth below:

DESIGN ELEMENT	PED EGG Foot File	PEDI-PERFECT Foot Care Set
Markings on Foot File	PED EGG design mark printed in blue ink 	Sally Hansen house mark molded in plastic 
Color of Foot File Case	Buff white with blue design mark	Translucent pearlized white
Shape of Components	Curved upper edge on storage bottom; curved top lip on top; no molded indentation	Bottom is either the flat grate or the flat buffer, depending on assembly by user, and has no curved edge; straight lip on top; molded indentation on top sides for easy grasping
Buffer Attachment	None; black emery paper provided to affix to bottom of file attachment	Separate pink ceramic buffer attachment that is also designed to serve as bottom of stacked unit for storage

Assembly of Component Parts	Grater attaches to body and the buffer is an emery paper that the consumer can glue to the bottom of the unit	Grater and buffer are interchangeably attachable to the body, and are stackable
Shape of Overall Form of Foot File		
Pattern of Grater		
Other Items Included	None other than emery paper	Toenail clipper, toe spacer

V. Blister Packaging Is A Widely Available Form Of Product Packaging

31. Blister packaging is a commonplace, widely available form of packaging used for, *inter alia*, bulky items or a collection of smaller items, particularly those that are hung on store racks. Blister packaging, which is a category of carded packaging, consists of a “preformed plastic blister, heat-seal coating, printing ink and paperboard card.” *The Wiley Encyclopedia of Packaging Technology* 161 (Aaron L. Brody & Kenneth S. Marsh eds. 2d ed., 1997), a true and correct copy of which is annexed as Exhibit 31.

32. Blister packaging has been the subject of scores of utility patents. In fact, a search of the USPTO patent database of the phrase “blister package” in patent titles returns over 100 items. True and correct print-outs of just three utility patents (U.S. Patent Nos. 4,781,289; 5,429,241; and 4,669,610) from the USPTO website www.uspto.gov are annexed as Exhibit 32,

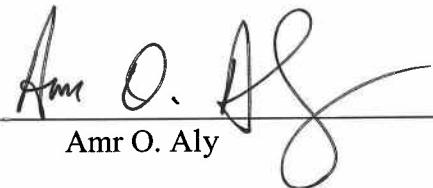
VI. Blue And White Colors Are Commonly Found In Consumer Product Packaging

33. The colors blue and white are commonly used in packaging of consumer products. Annexed as Exhibit 33 are true and correct print-outs from the website of the drug store chain Rite-Aid, depicting representative examples of consumer product packaging using a white background with blue typography.

VII. The Use Of A Foot Silhouette On Foot-Related Product Packaging Is Not Distinctive

34. Images of foot silhouettes are often used for marketing foot-related products. The USPTO official database contains numerous trademark registrations for design marks including the shape of a foot. True and correct print-outs of selected foot silhouette registrations from the USPTO website www.uspto.gov are annexed as Exhibit 34.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on September 29, 2009 in New York, New York.



Amr O. Aly